Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	

REPLY COMMENTS OF INCOMPAS

Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5746

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I. INTRODUCTION AND SUMMARY

The record in this inquiry[1] is clear—competition for video and broadband services in multiple tenant environments ("MTEs," also referred to as multiple dwelling units, "MDUs") is far less robust than the market for these services in single family homes.[2] The considerable barriers to entry faced by competitive providers seeking access to MTEs imperils the business case for the deployment of next-generation networks and services to the thirty percent of American consumers who live in multi-unit premises. Without access to these providers, residents of MTEs will be denied the benefits inherent to a competitive telecommunications market—innovative services (such as fiber), higher speeds, and lower prices. As the Commission seeks to bridge the digital divide and bring the benefits of high-speed Internet access to communities across the country, INCOMPAS urges the Commission to closely

[1] *Improving Competitive Broadband Access to Multiple Tenant Environments*, FCC 17-78 (rel. June 23, 2017) ("*MTE NOI*").

[2] *See* Comments of the City and County of San Francisco ("San Francisco") at 1; Comments of the City of Seattle at 1; Comments of the Fiber Broadband Association ("FBA") at 12-13; Comments of Horry Telephone Cooperative, Inc. at 5; Comments of the Institute for Local Self-Reliance and Next Century Cities at 1-2; Comments of NetMoby, Inc. at 3; Comments of Public Knowledge at 2-3; Comments of Sprint Corporation at 2; Comments of Starry, Inc. at 3. Unless otherwise noted, all comments cited herein were filed in GN Docket No. 17-142 on July 24, 2017.

examine the record in the instant proceeding, which is replete with examples of the hurdles that competitive providers face when trying to provide services to MTEs that are already served by an incumbent.

Though the Commission has prohibited the use of exclusive service contracts by MVPDs and telecommunications providers,[3] companies have replaced those agreements with equally pernicious arrangements, including graduated revenue sharing and wiring exclusivity agreements. Further, those providers that are not subject to that prohibition (such as PCOs) have expanded their use of exclusive service agreements across the country. The result is a lack of choice for residents in these communities, leaving consumers with no option but to accept mediocre service at high prices. INCOMPAS therefore urges the Commission to open a new rulemaking proposing to prohibit the use of exclusive service agreements by all video, telecommunications, and broadband providers, as well as use of graduated revenue sharing and exclusive wiring agreements. INCOMPAS also encourages the Commission to investigate the use of rooftop exclusivity agreements to determine whether those arrangements should also be prohibited.

II. THE MARKET FOR BROADBAND SERVICES IN MTES AND MDUS IS NOT HEALTHY.

The Commission barred the use of exclusive service contracts in 2008, noting that such agreements "have the clear effect of barring new entry into MDUs"[4] and MTEs. Though it

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3 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, 22 FCC Rcd. 20235 (2007) ("*2007 Exclusive Service Contracts Order*").

4 *2007 Exclusive Service Contracts Order* at ¶ 10; *see also Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, FCC 08-87, 23 FCC Rcd. 5385 ¶ 5 (2008) ("*2008 Competitive Networks Order*") ("exclusive agreements to provide

declined in 2010 to extend its prohibition on exclusive service contracts to the use of bulk billing and exclusive marketing agreements, the Commission noted—as it had in 2000 and 2003—that it would revisit its conclusions if "marketplace conditions and consumer effects appear markedly different."[5]

That is precisely what the record on this inquiry reveals—a marketplace in which incumbent providers use these permitted arrangements as well as graduated revenue sharing and wiring exclusivity agreements to prevent new competition in apartment buildings, condos, commercial buildings and venues, and in communities of single-family homes. Even where incumbent providers adhere to the letter of the exclusive service contracts prohibition, they are able and willing to impose terms and conditions on property owners and their residents that have the same result as such prohibited arrangements. These terms and conditions take many forms: circumventing the transfer of title to inside wiring contemplated in the Commission's inside wiring rules (which, as INCOMPAS and other commenters point out, often violate the existing wiring rules); threatening litigation to property owners that allow technicians wearing branded clothing or driving branded vehicles on premises; and tying their anticompetitive requirements to arrangements like bulk billing that might otherwise be beneficial to consumers.[6]

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telecommunications services to residential customers in MTEs harm competition and consumers without evidence of countervailing benefits").

5 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Second Report and Order, FCC 10-35, 25 FCC Rcd. 2460 (2010) ("*2010 Exclusive Service Contracts Order*").

6 In addition, PCOs, which are not subject to the Commission's prohibition on exclusive service contracts, have expanded their use of exclusive service contracts since 2010, using them to require property owners to refuse access to competitive providers, even where residents want service from a different company. *Cf. Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013).

Notwithstanding claims of property owners and incumbent providers, the market for broadband in MTEs, even in urban areas where residents theoretically have access to two providers, is not healthy. Normally, when a new provider enters a market, cable and telco incumbents make consumer-friendly changes to their network and services, such as increasing speeds, upgrading their infrastructure, and lowering prices. The fact that these benefits are not being experienced by MTE residents indicates that other practices are influencing the number of providers that are available in these buildings, which ultimately diminishes the quality of high-speed Internet access being delivered. Indeed, even the District of Columbia—home to more than 600,000 people in a large urban and suburban metropolitan area, many of whom live in MTEs and MDUs—has, on a county level, the 29th lowest rate of home broadband service faster than dial-up.[7]

Though numerous factors are involved in the lack of widely available, robust, and highly reliable broadband service in urban areas, it is clear that consumers' inability to access broadband service is not simply a rural-urban issue. The comments in this proceeding and on the Multifamily Broadband Council's petition for preemption of San Francisco's Article 52[8] make clear that one critical reason for the digital divide in urban areas is that competitive providers are

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(describing use of an exclusive service contract by OpenBand, which unsuccessfully argued that it was permitted to enter into that contract because it was a PCO).

7 *See* Clare Malone, *Lots of People in Cities Still Can't Afford Broadband*, FIVETHIRTYEIGHT (Aug. 2, 2017), https://fivethirtyeight.com/features/lots-of-people-in-cities-still-cant-afford-broadband/.

8 *See* Petition for Preemption of the Multifamily Broadband Council, MB Docket No. 17-91 (filed Feb. 24, 2017) ("MBC Petition").

routinely unable to provide service in MTEs and MDUs, even where residents want that service,[9] because property owners are tied to various forms of exclusivity agreements that, either actually or practically, prohibit them from allowing new providers in their communities.

III. THE COMMISSION SHOULD ADOPT A RULEMAKING PROHIBITING THE USE OF ANTI-COMPETITIVE AGREEMENTS IN MTEs.

INCOMPAS asks the Commission to adopt an NPRM proposing rules prohibiting graduated revenue sharing agreements and wiring exclusivity agreements in MDUs, and from entering into other kinds of agreements, such as bulk billing and exclusive marketing agreements, where those agreements act as de facto exclusivity agreements. INCOMPAS also asks the Commission to open an inquiry into the use of rooftop exclusivity agreements and, if appropriate, include those arrangements in the scope of its proposed rules. INCOMPAS encourages the Commission to propose that any such rules would continue to permit cost-based arrangements, as such arrangements are inherently non-discriminatory. But if the Commission adopts a cost-based exception, it should require incumbents to make available on request evidence that their agreements with property owners are, in fact, cost-based and do not impose discriminatory fees that disadvantage consumers.

A. Incumbent Providers Use Many Forms of Exclusive Agreements to Prevent Competitors from Offering Service in MDUs.

As INCOMPAS and others noted, the use of graduated revenue sharing and wiring exclusivity agreements in MTEs and MDUs contributes heavily to competitive providers'

[9] *See, e.g.*, Comments of FastMesh at 1; Comments of NetMoby at 6 (citing Comments of FastMesh); Comments of CALTEL on MBC Petition, MB Docket No. 17-91, at 9-10 (May 18, 2017) (describing experience of Sonic Telecom).

inability to offer service in these communities.[10] Proponents of graduated revenue sharing and wiring exclusivity agreements argue that the Commission should look to the record on the *2010 Exclusive Service Contracts Order* as proof that use of these agreements does not harm competition in the market for broadband services in MTEs and MDUs.[11] But these claims ignore the obvious "evidence that circumstances have changed" in the intervening years,[12] and disregard the record evidence that, on balance and as used today, these practices do not benefit consumers.

First, the kinds of companies offering communications services, and how they offer those services, has dramatically changed—today, triple-play bundles are offered not only by cable operators and ILECs but also by competitive fiber companies and fixed wireless providers.[13] As the services landscape has changed, so too have the methods providers use to forestall

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10 *See* Comments of INCOMPAS at 9-13 (explaining that the effect of revenue sharing stifles competition when competitive providers are unwilling or unable to participate in a kickback scheme); Comments of FBA at 11; Comments of FastMesh at 1; Comments of NetMoby at 6; Comments of Public Knowledge at 3-4; Comments of Starry at 7-8.

11 Comments of the National Multifamily Housing Council ("NMHC") at 3 ("It is clear from the record that led to the *2010 Exclusive Service Contracts Order* that exclusive marketing and bulk billing agreements allow MTE owners to offer state-of-the-art communications services to residents at reduced costs, and there is no evidence that circumstances have changed.").

12 *Id.* at 3.

13 Comments of San Francisco at 9 ("Today, the competitive landscape has completely changed. In San Francisco, Comcast, AT&T, and Wave Broadband offer triple play packages to their customers, combining television, telephone, and internet services. Sonic offers telephone and internet services with speeds up to one gigabit and makes DIRECTV service available to its customers. Monkeybrains and Webpass offer internet services to residential and commercial customers at prices that compete with Comcast and AT&T. Today, internet service is sufficient for many residential customers that have chosen to "cut the cord" and use services like Netflix, Amazon Prime, Hulu DIRECTV Now, fuboTV, Sling TV rather than purchasing cable services.").

competition. Thus, for instance, though the Commission found in 2007 that exclusivity clauses used by cable MVPDs were a "complete bar to entry into MDUs by…PCOs,"[14] it now seems that PCOs themselves use exclusive service contracts to bar entry by other MVPDs.[15] And MVPDs, which relied on exclusive service agreements prior to 2007, have shifted their focus to other commercial arrangements—namely, graduated revenue sharing agreements and wiring exclusivity. Moreover, incumbent providers regularly tie bulk billing and exclusive marketing agreements—arrangements that are not intrinsically anti-competitive—to their leaseback and kickback schemes. By layering multiple restrictions into contracts with property owners, incumbent providers create an environment in which property owners either believe they have no ability to allow new providers in the community or have extreme disincentives—including financial disincentives—to doing so.

1. Graduated Revenue Sharing Agreements

As INCOMPAS and others noted in opening comments on this inquiry, graduated revenue sharing agreements amount to "pay to play" arrangements and result in a race to the bottom for other providers.[16] Indeed, those commenters arguing in support of these agreements illustrate just how financially disadvantageous it is for property owners to allow multiple providers into a building. RealtyCom argues that graduated revenue sharing serves no purpose other than to reimburse the costs of property owners,[17] and posits that a graduated revenue

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[14] *2007 Exclusive Services Contracts Order* ¶ 9.

[15] *See* Comments of INCOMPAS at 20.

[16] *See id.* at 9-13; Comments of FastMesh at 1; Comments of NetMoby at 6; Comments of Public Knowledge at 3; Comments of Starry at 7-8.

[17] Comments of RealtyCom at 8.

sharing agreement, based on the schedule published in a recent *Wired* article,[18] is worth only a few hundred dollars per month to the property owner.[19] But RealtyCom's scenario assumes that the MDU at issue has two providers and those providers equally split subscribers in the MDU, meaning neither overcomes the 51 percent threshold, or "cliff," for video service.[20] Using RealtyCom's own figures, but changing a single variable—reducing the number of providers from two to one—it is easy to see how these arrangements incentivize monopolies in MTEs. With only one provider, the property owner's revenue share jumps from about $300 per month (about $150 from two providers), to nearly $1,200 per month.[21] That represents an increase of

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[18] Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, WIRED (June 26, 2016), https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers ("*The New Payola*").

[19] Comments of RealtyCom at 7-8 ("Let us assume a 200-unit community with two Carriers, with an exact division of subscriber penetration between them. With a reasonable 60% total penetration for video services, each Carrier would have 30%; and with 80% total penetration for Internet services, they each would have 40%. Using the published schedule, the property would receive no payment at all for video services, since the obligation does not even begin until 51% penetration. For Internet service at 40% penetration, the property would receive a 4% revenue share. With an average high speed Internet bill of $49 (not including taxes, fees, and whatever other exclusions the Carrier may have negotiated in its contract), the revenue share would add up to approximately $156.80 per month from each Carrier (assuming both are paying revenue share using the same schedule). That is no windfall, by any stretch of the imagination, and barely enough to cover some of the expense of having property staff manage Carriers' access and work, pay for electrical power for Carriers' equipment, and address resident issues with respect to communications services.").

[20] "Cliff" thresholds in a revenue sharing arrangement require a certain percentage of subscribers to purchase service from a provider before the provider makes any payments to the property owner. As such, these thresholds deter competition by their very nature, because multiple providers split subscribers within a building, making it less likely for either provider to reach the threshold. Moreover, they further call into question the assertion that revenue sharing schemes are tied to actual costs, as it would defy common sense that owners would only incur costs if a provider reached a certain threshold of subscribers.

[21] Thus, if one provider offers both broadband and video in the same 200-unit community, with the same penetration rates—60 percent for video and 80 percent for broadband—at $49 for

more than 380 percent—an increase that in no way could reasonably be construed as tied to the property owner's cost of accommodating service (as how could accommodating one provider instead of two *increase* the property owner's costs, let alone to that extent?).

Moreover, RealtyCom's figures assume lower take rates and lower service prices than are typical. The payments to a property owner would significantly increase in the same 200-unit MDU with a more realistic 90 percent take rate for both broadband and video service (take rates which are likely to be bolstered by a marketing exclusivity agreement), with each service costing $70 (on average, over the course of a contract) per month. That scenario—using the same graduated revenue share schedule as in RealtyCom's hypothetical—would lead to a revenue share payment of $2,520 per month or $30,240 per year.[22] And that does not even address the customary addition of so-called one-time "door fees" that can reach $200 or more per unit.[23] Multiply those payments by a portfolio of MTEs and it is easy to see how such revenue share arrangements operate as a wide-ranging deterrent for competitive services. INCOMPAS members are regularly unable to negotiate agreements to provide service in MTEs and MDUs because property owners are unwilling to risk the loss of revenue share payments offered by incumbents that would be caused by increasing the number of providers in a community.

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each service (and $98 for a bundle), that single provider will achieve a greater-than-51-percent penetration rate for video. Overcoming the 51 percent "cliff" entitles the property owner to a video services payment of seven percent (up from zero) and raises the broadband services payment to 10 percent from four percent. The result is a property owner payment of $411.60 per month for video service and $784.00 per month for broadband service, for a total of $1195.60 per month, or $14,347.20 per year.

[22] The revenue sharing schedule that RealtyCom relies on provides for a ten percent revenue share for both video and broadband at a 90 percent take rate. *See The New Payola*.

[23] The revenue sharing schedule that RealtyCom relies on provides for door fees of "[u]p to $130 per unit."

Even worse, one of our members reports seeing graduated revenue sharing agreements regularly used in low-income housing.[24] Some commenters argue that these agreements (no doubt because of their ability to deter competition) are necessary to incentivize providers to offer service in these communities[25]—regardless of the fact that the Commission has repeatedly found that arrangements that serve to block new providers from offering service do *not* encourage investment by incumbents.[26] Graduated revenue sharing agreements have no consumer benefit—there is no evidence that property owners, for instance, use revenue share payments to offset rents. Anti-competitive practices that reward landlords and providers for higher prices and remove competitive access but have no countervailing consumer benefit for residents that are already limited in their choice of housing are especially pernicious.

2. Exclusive Wiring

Exclusive wiring agreements represent efforts by incumbents to circumvent the Commission's inside wiring rules by entering into agreements under which they do not hold legal title to wiring but have exclusive use of it.[27] As FBA notes, divorcing the ownership of inside wiring from the use of that wiring have provided grounds on which incumbent providers

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[24] An INCOMPAS member recently attempted to serve a public housing property with a heavily discounted high-speed broadband product as part of a community impact program. The property was party to a revenue share arrangement coupled with a marketing exclusivity. While the housing authority eventually allowed our member to provide its discounted internet service to the residents, the member was unable to engage in any on-site internet education, STEM awareness, or digital literacy training due to the property's marketing exclusivity.

[25] *See* Comments of NMHC at 5-6.

[26] *2007 Exclusive Service Contracts Order* ¶ 28 ("there is no evidence in the record, other than generalities and anecdotes, that incumbent MVPD providers couple exclusivity clauses with significant new investments . . . .").

[27] *See* Comments of FBA at 12.

are avoiding the Commission's intended transfer of ownership from the provider to the property owner or resident, without any commensurate benefit.[28] The record is clear that wiring exclusivity has no relationship to the provision of high-quality service;[29] thus, the only result of these leaseback agreements is to prevent residents from obtaining service from their desired provider.

INCOMPAS is pleased that some property owners and providers assert that they do not use exclusive wiring agreements and that they take great efforts to ensure their buildings and communities are wired for use by multiple providers.[30] In the experience of INCOMPAS members, however, these companies are the outliers. Many more properties are inaccessible to competitive service. And though NMHC argues that preventing exclusive wiring agreements would be an impermissible regulation of property owners' business by the FCC, wiring exclusivity violates the Commission's existing wiring rules, and further, nothing restrains the FCC from prohibiting MVPDs and telecommunications providers[31] from entering into an agreement providing for exclusive use of wiring where that agreement functions to prohibit access by a new provider as allowed under the Commission's inside wiring rules.[32]

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[28] *Id.*

[29] *Id.* at 12-13; Comments of Public Knowledge at 3-4; *see also 2007 Exclusive Service Contracts Order* ¶ 28.

[30] *See, e.g.,* Comments of Camden Property Trust at 8; Comments of Hotwire Communications, LLC at 7.

[31] As discussed in greater detail below, INCOMPAS also believes the Commission has authority to impose the same requirements on broadband providers, regardless of whether broadband service is classified as a telecommunications service—as it is today—or an information service—as the Commission has proposed in its Internet Freedom NPRM.

[32] In addition, the Commission should continue to disregard arguments by commenters arguing that legislative efforts to prohibit exclusive wiring arrangements amount to a mandate to

3. Bulk Billing and Exclusive Marketing

With respect to bulk billing and exclusive marketing arrangements, the Commission should prohibit providers from enforcing these agreements in ways that forestall competition. That includes threatening property owners for breach of marketing exclusivity under an overly-expansive definition of marketing, such as in instances where the property owner allows a competing provider on the premises wearing branded clothing or driving a branded vehicle. While it may be true that the Commission cannot legally require MTE owners to "endorse all service providers equally,"[33] the Commission can prohibit MVPDs, BIAS providers, and telecommunications providers from using exclusive marketing agreements to prevent property owners from, for instance, allowing competitors' employees into a community at the request of a resident to install and maintain service or permitting installation of branded equipment in residences. INCOMPAS encourages the Commission to help define what constitutes permissible marketing exclusivity.

IV. THE FCC HAS AUTHORITY TO ADDRESS DISCRIMINATORY AND ANTI-COMPETITIVE BEHAVIOR BY COMMUNICATIONS AND VIDEO SERVICES PROVIDERS IN MTEs.

As the Commission noted in 2007, it has ample authority, both direct and ancillary, to prohibit anticompetitive behavior by MVPDs subject to Section 628(b).[34] As it noted in 2008,

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share wiring. *See* Comments of Camden Property Trust at 8. Camden, in particular, repeatedly asserts that San Francisco's Article 52 requires property owners to allow more than one provider to use the same home run wiring at the same time, if desired by the resident. San Francisco and others, however, have demonstrated repeatedly that this is not the intended or expected effect of Article 52. *See* Comments of FBA on MBC Petition. MB Docket No. 17-91, at 22-23 (May 18, 2017); Comments of INCOMPAS at 18.

[33] NMHC at 8.

[34] *See 2007 Exclusive Service Contracts Order* ¶ 40.

the Commission also has authority to prohibit anticompetitive behavior by telecommunications providers.[35] Today, broadband service (specifically, BIAS) has been classified a telecommunications service; as a result, even those providers that are not subject to Section 628(b) but that provide broadband service in MDUs are prohibited from enforcing exclusive service contracts.[36] The Commission is, of course, considering a proposal to reclassify broadband service as an information service; but that reclassification would not change its authority over MVPDs subject to Section 628(b) or over telecommunications service providers.[37] Reclassification would, however, limit the Commission's ability to ensure regulatory parity between providers, without adoption of new rules designed to foster competitive markets and consumer choice. The Commission cannot promote broadband if certain providers, offering substantially the same service as cable operators and common carriers, may act in anticompetitive ways simply because they are subject to a lighter-touch regulatory regime.

Section 706, as construed by the D.C. Circuit,[38] as well as Section 201, give the Commission the authority to prohibit the use of anticompetitive contracts in MDUs by any MVPD, telecommunications provider, or broadband provider. Section 706 empowers the Commission to adopt "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,"[39] while

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[35] *2008 Competitive Networks Order* ¶¶ 10, 14.

[36] *Cf.* Comments of NetMoby at 11 (noting that the Commission should enforce its prohibition on exclusive contracts against BIAS providers).

[37] INCOMPAS believes such a decision would be contrary to law, though. *See* Comments of INCOMPAS at 41-63, WC Docket No. 17-108 (July 17, 2017).

[38] *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

[39] 47 U.S.C. § 1302.

Section 201 gives the Commission authority to adopt such rules as are necessary to ensure that the rates, terms, and conditions of the provision of common carrier services are just and reasonable.[40]

If certain cable and telecommunications providers are prohibited from enforcing anti-competitive contractual provisions that other providers may continue to use, that disparate treatment may serve as a barrier to infrastructure investment as well as result in unjust and unreasonable conditions of service on customers of the providers subject to the prohibition. More specifically, if BIAS providers and PCOs are not subject to the prohibition on exclusive contracts because broadband service is not a telecommunications service and PCOs are not subject to Section 628(b), cable MSOs and telecommunications providers that are subject to that prohibition would be disadvantaged, reducing their ability to expand access to broadband services in communities subject to an exclusive service agreement with a BIAS provider or PCO. Their customers would be disadvantaged as well, by reducing their choice of provider and exposing them to higher prices for mediocre service.

The Commission has previously cited its authority under Section 706 and Section 201 in adopting similar rules—for instance, extending application of its over-the-air reception devices ("OTARD") rules to fixed wireless signals[41] and prohibiting the use of exclusive contracts by

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[40] 47 U.S.C. § 201(b).

[41] Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57 ¶ 103 (2000) ("we believe that Section 706 of the 1996 Act, which addresses advanced telecommunications

telecommunications providers in residential MTEs.[42] These statutory provisions allow the Commission to adopt rules preventing lightly regulated service providers—*e.g.*, PCOs and BIAS providers—from enforcing exclusive services contracts in MTEs and MDUs and from entering into other such contracts that the Commission determines to be inherently anti-competitive (such as graduated revenue sharing agreements and wiring exclusivity agreements). Such contracts not only harm consumers by subjecting them to higher prices for lower-quality service, but they also disadvantage providers, such as cable operators and common carriers, that are subject to more regulation—even where the service offered is identical. Prohibiting enforcement of anticompetitive agreements by all communications providers in MTEs and MDUs would ensure parity of regulatory treatment among different providers and, as such, facilitate competition.[43]

V. THE COMMISSION SHOULD NOT OVERREACH ITS AUTHORITY TO PREEMPT STATE AND LOCAL PROPERTY LAWS.

State and local property laws govern the actions of property owners and the FCC has always deferred to these authorities.[44] It should not change that practice now because local

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services, also supports our extension of the OTARD principles"); id. ¶ 104 ("Our action also is necessary to further the consumer protection purposes of Sections 201(b)...").

[42] 2008 Competitive Networks Order ¶¶ 10, 14.

[43] *See, e.g.,* Statement of Chairman Kevin J. Martin on *2008 Competitive Networks Order* ("this Order demonstrates the Commission and my commitment to ensure we achieve regulatory parity by applying a consistent regulatory framework across platforms"); Statement of Commissioner Deborah Taylor Tate on *2008 Competitive Networks Order* ("In the interest of regulatory parity, it is essential that we seek to apply our rules consistently across all platforms in a timely manner.").

[44] *Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, FCC 03-9, 18 FCC Rcd. 1342 ¶¶ 36-39 (2003).

authorities have adopted regulations that limit incumbents' ability to engage in anticompetitive practices. For instance, the City of Seattle notes that it "believes that there are practices occurring in the MTE environment in Seattle that are adversely affecting competition and broadband deployment," and that "local actions are needed to address issues specific to MTE property owners and managers, who are business license holders and therefore subject to localities."[45]

Opponents of such state and local laws claim that these regulations "are likely to thwart deployment of facilities to MTEs that require significant expenditures to wire."[46] That claim, however, is belied by the facts on the ground in these cities, where new competitive entrants have been able to deploy service to MDUs after having been shut out of such communities.[47] Far from inhibiting broadband deployment, state and local property laws establishing mandatory access principles serve to facilitate entry by new competitors—and do so without impinging on the Commission's exclusive jurisdiction. Rather than attempting to preempt such laws, the FCC should instead take what actions it can to prevent communications providers from enforcing anticompetitive agreements and leave regulation of property owners to state and local governments.

[45] Comments of Seattle at 1-2; *see also* Reply Comments of Boston on MBC Petition, MB Docket No. 17-91, at 1-2 (June 9, 2017).

[46] Comments of NCTA at 2.

[47] *See* Comments of CALTEL on MBC Petition. MB Docket No. 17-91, at 9-10, 12 (May 18, 2017) (describing experience of Sonic Telecom); Reply Comments of INCOMPAS, MB Docket No. 17-91, at 6 (June 9, 2017).

VI. CONCLUSION

INCOMPAS urges the Commission to address competitive providers' access to MTEs as a necessary component of its larger efforts to accelerate broadband deployment. Encouraging robust competition in the MTE market will ensure that consumer receive the benefits of better service, higher speeds, and lower prices from incumbents and competitors alike. INCOMPAS encourages the Commission to propose new rules under its Section 706 authority prohibiting the use of graduated revenue sharing and wiring exclusivity agreements in MTEs and MDUs, and to prohibit the use of bulk billing and exclusive marketing agreements to prevent new competitors from offering service in those communities. The Commission should also open an inquiry into the use of rooftop exclusivity agreements to determine whether such arrangements should be included in any new rules. Such rules would encourage broadband deployment by promoting competition among all broadband providers and by ensuring regulatory parity. But the Commission should be mindful of the extent of its authority and continue to defer to state and local governments on property laws that allow competitive providers access to MTEs.

Respectfully submitted,

INCOMPAS

/s/Christopher L. Shipley

Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5746

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